89-1339

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

FRANK ACKLEY
D.B.A. VILLAGE SQUARE CHEVRON, ET AL.,

Petitioners,

v.

GULF OIL CORPORATION,
CHEVRON U.S.A., INC., and
CUMBERLAND FARMS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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68 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a franchisor's assignment/delegation of franchise rights and performance obligations constitutes a non-renewal or termination of a franchise relationship under the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 et seq. ("PMPA).

2. Whether the substantially conflicting decisions of numerous Federal District and Appellate Courts regarding question number 1 above requires resolution by this Court.

3. Whether the delegation of franchise performance obligations to a third party is permissible when the obligee has a substantial interest in the assignor performing, the delegation would materially increase the burdens and risks of the obligee, and where the delegation would result in the obligee's loss of explicit and

intended remedial statutory rights and protections.

4. Whether a valid petroleum market withdrawal has occurred where:

a) The franchisor has a continuing petroleum franchise relationship with its petroleum franchisee, as those terms are defined within PMPA § 2801, within the geographic area from which the franchisor claims to have withdrawn;

b) The petroleum franchisee of the allegedly "withdrawn" franchisor continues to sell the franchisor's trademarked petroleum from franchise retail outlets within the geographic area claimed to have been "withdrawn" from;

c) The withdrawing franchisor has failed to comply with the

mandatory notice provisions of PMPA § 2804.

5. Whether a remedial state statute may be construed in such a way as to render it a nullity.

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LIST OF PARTIES

The parties to the proceeding below, and Petitioners herein, are: Robert A. Blosio, d/b/a Long Ridge Chevron, Inc.; James D. Chayka, d/b/a Home Gulf Service, Inc.; Robert Cohn, d/b/a Fairport Gulf; Vincent Condito, d/b/a Vinny's Courtland Service; George S. Lombardo, Jr., d/b/a Avon Chevron Service, Inc.; Paul A. Morello, Sr., d/b/a Morello's Gulf/Morello's Service Station; Douglas Schley, d/b/a Fairfield Gulf; Thomas S. Zawatski, d/b/a Cos Cob Gulf; David MaGuire, d/b/a Al & Bill's Gulf Service, Inc.; Kenneth Cerritelli, d/b/a Cerritelli Chevron Service, Inc.; Santos J. Ciarcia, d/b/a Glastonbury Chevron, and Frederick O'Neil, d/b/a Chevron Car Wash.

Parties to the proceedings below who are Respondents herein are Gulf Oil Corporation, Chevron U.S.A., Inc., and Cumberland Farms, Inc.

IN THE

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OCTOBER TERM, 1989

FRANK ACKLEY,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reprinted herein as Appendix A. The Opinion of the District Court for the District of Connecticut is reprinted herein as Appendix B.[1]

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[1] References to "A" are to Appendix A, the Court of Appeals decision; references to "B" are to Appendix B, the District Court's Opinion; references to "C" are to the PMPA statutory excerpts; references to "E.R." are to the Excerpts of Record in the Court of Appeals.

JURISDICTION

The Opinion of the Court of Appeals for the Second Circuit was entered on November 27, 1989. This Court has jurisdiction to review the judgment below by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Petroleum Marketing Practices Act ("PMPA") 15 U.S.C. 2801 et seq. Relevant portions of the PMPA are reprinted as Appendix C.

Uniform Commercial Code § 2-210[2] regarding delegations and assignments of commercial contract rights and obligations, which provides in pertinent part:

> (1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promissor perform or control the acts required by the contract. No delegation of performance relieves the

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[2] As codified in Connecticut General Statutes § 42-2-210.

> party delegating of any duty to perform or any liability for breach.
>
> (2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. . . .

Connecticut General Statutes § 14-344(b), prohibiting refiners such as Gulf and Chevron from operating retail petroleum outlets, which provides in pertinent part:

> "After July 1, 1980, no producer or refiner of petroleum products shall operate a major brand, secondary brand or unbranded retail service station in the state with employees of such producer or refiner, a subsidiary company, commissioned agent or under a contract with any person, firm or corporation managing a service station on a fee arrangement with such a producer or refiner. Any such station shall be operated only by a retail service station dealer."

Connecticut General Statutes 42-133(k), defining the term "franchise" as applicable to relevant state statutes regarding

franchise relationships, subsection (b) of which statute provides in pertinent part:

> "(b) 'Franchise' means an oral or written agreement or arrangement in which (1) a franchisee is granted the right to engage in the business of offering, selling or distributing motor vehicle fuels and oils and other related products and offering or selling services associated with such products and with gasoline service stations under a marketing plan or system prescribed in substantial part by a franchisor . . . and (2) the operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, tradename . . . designating the franchisor . . . and includes any agreement between a . . . refiner or producer and a retailer, or between a distributor, wholesaler or jobber and a retailer."

STATEMENT OF THE CASE

The issues and standards relating to the assignment/delegation of franchisor obligations is of critical importance to franchisees operating more than five hundred and nine thousand (509,000) franchise outlets within the United States,[3] including ninety one thousand eight hundred forty (91,840) petroleum franchisees.[4]

Franchisees enter into contractual relationships with their franchisors in clear and intended reliance upon the facts and

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[3] Resulting in sales in excess of $630 billion in the United States in 1988. This represents an increase of 91% over the level of franchise sales at the beginning of the 1980s. Employment in franchising is expected to reach 7.3 million in 1988. U.S. Department of Commerce, International Trade Administration, Franchising In the Economy 1986-1988, at p. 1.

[4] Franchising In the Economy 1986-1988, Table 3 at p. 28. This represents a decline from 222,000 petroleum franchisees in 1970. Franchising In the Economy, Table 10 at p. 35.

circumstances existing at the time the relationship is commenced, and the quality and experience of their franchisor.[5] However, franchisors have, to an accelerating degree, been seeking to delegate their franchise performance obligations to third parties with whom their franchisees have had no prior relationship, nor expectation of a relationship. Oftentimes, as in this case, these assignees are prior competitors of the franchisees. These delegations have occurred both as a result of outright delegations/assignments, or franchisor mergers and acquisitions, oftentimes

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[5] Recognizing the paucity of information previously provided to prospective franchisees, and the industry's abusive history, the Federal Trade Commission has enacted significant franchisor factual disclosure guidelines (16 C.F.R., Ch. 436), as have numerous states, which disclosures prospective franchisees are intended to rely upon in determining whether to become involved in the franchise relationship.

resulting in the acquiring franchisor incurring significant debt obligations.

Within the petroleum industry, Arco in 1986 withdrew from the entire eastern United States, delegating its franchise obligations to prior competitors such as Shell, and to others with no experience whatsoever in petroleum franchising, such as Atlantic Petroleum. Exxon is presently involved in the "trading" of franchisees with Texaco in California, Nevada, Oregon and Washington.

Similar franchise delegations have taken place involving thousands of Burger King franchisees throughout the United States regarding Pillsbury's acquisition of Burger King. Most recently Roy Rogers announced the intended sale of thousands of franchisee operations to Hardees.

The provisions of the U.C.C., primarly § 2-210, were enacted to address assignment and

delegation issues in the context of commercial transactions such as franchise relationships. In addition, the PMPA was enacted to address the issue of petroleum franchisor assignments and delegations, market withdrawals, and service station location sales within the petroleum industry nationwide, and the affect that those practices have upon franchisees which Congress recognized as having been long abused.[6] The application of PMPA's statutory standards has become significantly confused, however, as a result of numerous conflicting decisions within the federal district and

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[6] Since the date of the enactment of PMPA in 1978, there has been a thirty-four percent (34%) reduction in the number of petroleum franchisees, from one hundred and thirty nine thousand five hundred sixty-three (139,563) in 1978 to ninety one thousand eight hundred and forty (91, 840) in 1988. Franchising In the Economy 1986-1988, supra, Table 3 at p. 28, and Table 13 at p. 38.

appellate courts.

The application of the standards of the U.C.C. to general franchise assignments and delegations is of major importance to the future evolution of the industry, and to franchisee and franchisor rights and obligations. The U.S. Department of Commerce predicts that franchising will be the leading method of doing business in the 1990s within the United States.[7] This Court has at no time construed the provisions of the PMPA, and has only in a very limited fashion reviewed issues relating to the franchise industry as a whole. The resolution of these questions is of enormous practical consequence, since they go to the very heart of the continuing evolution of the franchise marketing system within this country. If the decision of the

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[7] Franchising in the Economy, supra, at p. 6.

Court of Appeals is allowed to stand, it threatens to imperil the continuing rights of hundreds of thousands of franchisees to receive satisfactory performance of their franchisors' obligations. The issues presented are therefore of exceptional national significance, meriting review by this Court.

A. STATEMENT OF FACTS

Petitioners are twelve petroleum franchisees, each of whom operates a service station business from leased marketing premises located throughout the State of Connecticut. Prior to July 1, 1985, the Gulf Oil Corporation ("Gulf") was the franchisor of several of the Petitioners. On July 1, 1985, Chevron merged with Gulf, creating Chevron U.S.A., Inc. ("Chevron"). Chevron had also been the franchisor of several of the Petitioners before its merger with Gulf.

Both Gulf and Chevron were major international integrated refiners and distributors of petroleum products before their merger.

Under the terms of an agreement between Chevron and Cumberland dated December 19, 1985, Cumberland purchased assets and properties owned by Chevron throughout the northeastern United States. Those purchases included all of the service stations owned or leased by Chevron located within the State of Connecticut, including those locations occupied by the Petitioners.

Before entering into its agreement with Chevron, Cumberland was primarily a convenience store chain operator, operating approximately twelve hundred (1,200) convenience stores throughout the east coast. Approximately half of Cumberland's convenience stores also marketed gasoline.

Cumberland operated its convenience stores only through the use of its own employees. Cumberland had no franchise dealers. Although both Gulf and Chevron were refiners, Cumberland has consciously avoided acquiring the status of a refiner.[8]

Under the terms of its agreement with Cumberland, Chevron also delegated to Cumberland all of its contractual franchise obligations regarding those petroleum franchisees located throughout the northeast, including the Petitioners. This included approximately eleven hundred (1,100) franchisees.

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[8] E.R. 782 and 788. Prior to reaching its agreement with Chevron, Cumberland had acquired numerous service station locations from other suppliers, some of which were occupied by franchisees. Those locations occupied by franchisees were either divested by Cumberland or turned into company operations after the removal of the franchisee from the location. E.R. pp. 782-786; 841-844.

Cumberland eventually paid $238,500,000 to close the transaction.[9] To finance the transaction Cumberland was required to secure financing from the Bank of Boston in the amount of $250 million.[10] The service station properties acquired by Cumberland represented the major portion of the security for the financing obtained. Cumberland recognized that the station rents would have to be increased substantially in order to service the debt. It also intended to service the debt from profits generated by the sale of gasoline to its newly acquired franchisee locations, and from the sale of other products to those locations.[11]

After having reached agreement with Cumberland Chevron provided to each of its

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[9] E.R. pp. 186; 776-777, 789.

[10] E.R. pp. 789-790.

[11] E.R. pp. 791-797.

franchisees within the northeast, including the Petitioners, letters informing them of the intended transaction.[12] Chevron informed the franchisees that the sale was expected to close between May 1 and June 15, 1986. Further, Chevron would be assigning/delegating to Cumberland Farms all of its franchise rights and obligations. Franchisees who had been selling gasoline at retail under the Chevron trademark would be required to adopt the Gulf trademark. Chevron further stated that it did not believe that the sale to Cumberland, and the delegation to Cumberland of Chevron's franchise obligations, represented either a termination or non-renewal of those franchises under the PMPA. However, Chevron

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[12] Two separate letter notifications were provided to the Petitioners on February 14, 1986 and March 10, 1986. E.R. pp. 263, 267.

stated that if anyone later claimed that the sale and delegation involved a termination or non-renewal subject to the PMPA, Chevron was taking the "precaution" of giving its franchisees "formal notice of non-renewal under the PMPA." Chevron stated that it was non-renewing its franchisees because of its "determination to withdraw from the marketing of motor fuels throughout retail outlets in the geographic marketing area".

PMPA § 2802(b)(2)(E) provides that a "geographic market withdrawal" may be proper grounds for the termination or non-renewal of a petroleum franchise relationship if certain conditions, as discussed hereafter, are met.[13]

Thereafter, on June 1, 1986, only one

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[13] The mandatory written notice provision of PMPA § 2804 requires that franchisees be provided with written notice of the franchisor's intent to conduct a market withdrawal not less than one hundred and eighty (180) days before the actual "event" of withdrawal takes place.

hundred and five (105) after having provided notice of its intended market withdrawal to its franchisees, Chevron completed the "event" of market withdrawal by the transfer of all of its marketing assets within the northeast, and the delegation of all of its franchise obligations to Cumberland.[14]

Chevron and Gulf had both been refiners of gasoline when they were the franchisors of the Petitioners. Before Chevron's transfer of assets and delegation of duties to Cumberland on June 1, 1986, Cumberland had only marketed gasoline under the "Cumberland Farms" trademark or, alternatively, under other trademarks owned by Cumberland which were in no way related to a refiner.[15] Under the provisions of Connecticut General Statutes § 14-344(a) and (b), refiners such

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[14] E.R. pp. 274, 919-920.

[15] E.R. pp. 880-881; 897-898.

as Chevron and Gulf are explicitly prohibited from marketing gasoline from retail service station locations in Connecticut unless the service station location is operated by a franchisee. Chevron and Gulf were therefore at all times prohibited from selling gasoline within the State of Connecticut from company operations operated by employees. After June 1, 1986, however, this competitive prohibition and protection no longer applied to the franchisor of these Petitioners, since Cumberland is not a refiner.

Before June 1, 1986, Cumberland company-owned and employee operated fifty seven (57) Cumberland convenience stores selling gasoline under the Cumberland Farm's trademark within Connecticut. While either Gulf or Chevron was the franchisor to these Petitioners, it was statutorily prohibited from such activities. The Petitioners are

therefore now, for the first time, in competition, or prospective competition, with not only their own supplier, but a supplier competing in the very same marketplace, for the very same customers, selling under the same trademark, using the same credit card, with a pre-existing gasoline station network in Connecticut of fifty-seven stations. This is also in a situation where the competitive abilities of each of the dealers is now virtually dictated by Cumberland pursuant to the existing franchise agreements which substantially dictate the marketing activities of each of the Petitioners.[16]

The present situation in which these Petitioners find themselves must be contrasted with the situation where, before June 1, 1986, Chevron marketed solely through

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[16] E.R. pp. 669-677; 678-686; 687-695; 696-704; 705-713; 714-720; 752-763; 764-771.

it franchisees, and was in competition with Cumberland for gasoline sales. Cumberland's new-found ability to use the Gulf trademark for its network of retail locations, as compared to its prior sale of gasoline to the public under Cumberland's name alone, has provided Cumberland's company-operated stations with a significant advantage in the gasoline marketplace.[17]

After June 1, 1986, each of the Petitioners was required to purchase all of their gasoline from Cumberland. Each of Cumberland's fifty-seven company-operated retail locations in Connecticut also obtained all of their gasoline supply from Cumberland. However, Cumberland's company-operations obtained that gasoline from Cumberland at significantly lower prices than Cumberland

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[17] Statement of Cumberland President Haseotes, E.R. at 806(a).

charged to its captive franchisees, including the Petitioners, for the very same product.[18] Cumberland unilaterally sets both the price which it charges its franchisees/the Petitioners, and the price which it charges to its company-operated locations.[19] The price paid by the Petitioners to Cumberland is generally five to seven cents higher than that price charged by Cumberland to its company-operated locations, and has been as much as thirteen cents higher.[20] As a result, Cumberland's company-operated locations also sell gasoline, at retail, below the wholesale price Cumberland charges the Petitioners.[21]

The record is uncontradicted regarding the fact that the favored price given to

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[18] E.R. pp. 863, 868, 908.

[19] E.R. pp. 876-877; 904-905.

[20] E.R. pp. 866(a)-(b).

[21] E.R. pp. 862-863.

Cumberland company-operations places, and threatens to place, franchisees such as the Petitioners at a significant competitive disadvantage regarding the sale of identical gasoline under the Gulf trademark to the motoring public.[22]

Before Chevron's delegation to Cumberland the Petitioners' supplier could not retail Chevron gasoline from company-operated service station locations in Connecticut, and could not be in actual or threatened competition with its franchisees, since such activities were statutorily prohibited. Further, there was no incentive for the Petitioners' supplier to terminate or non-renew their franchises in order to convert their locations to company operations. The situation totally changed, however, as a

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[22] E.R. pp. 671, 680, 689, 698, 707, 716.

direct result of Chevron's delegation to Cumberland.

Within a few months after Chevron's delegation of duties, and "market withdrawal", Cumberland provided each of the Petitioners with franchise renewal documents. As a direct result of having incurred substantial debt in order to complete its transaction with Chevron, Cumberland now imposed huge rental increases upon the Petitioners.[23] The average rental increase imposed by Cumberland was 176% for the three year renewal term. Conversely, for the three year term of Chevron's prior franchise renewals, the total rental increase averaged 14.7%, i.e., less than 5% annually. Faced with the refusal of Cumberland to negotiate the rental increases, each of the Petitioners was required to execute the renewal documents

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[23] E.R. 795-796; 884-885.

under threat of termination and loss of their livelihood.[24] Under the terms of Cumberland's renewal documents, Cumberland also controls product delivery times and methods for gasoline, dealer counselling regarding gasoline sales and pricing, pump and storage tank maintenance and repair, advertising, imposition of contractual performance obligations (such as hours of operation), personal supervision requirements, reconstruction standards, and capital improvement decisions. It is uncontradicted in the record below that these factors all have a clear and significant competitive impact on the marketing of gasoline at each of the Petitioners' locations.[25]

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[24] Those renewal documents were executed and returned to Cumberland with letters of protest from the dealers.

[25] E.R. pp. 324-336; 341-353; 357-368; 373-385; 390-402; 406-417; 422-434; 470-481; 481-498; 503-515; 519-531; 536-546; 550-563; 567-578; 582-592; 597-605; 669-

As a further result of the Petitioners' loss of the protection from supplier operated retail service station locations, there is a substantially increased risk that the Petitioners' franchises will be replaced with company operations, and the market values of the Petitioners' franchises have been significantly reduced.[26] The Petitioners had a clear and substantial interest in such a prohibition restricting the retail marketing activities of their supplier, which remedial protections were destroyed as a direct result of Chevron's delegation to Cumberland.[27]

731.

[26] The record is totally uncontradicted in this regard. E.R. 752-763; 764-771. Replacement of franchises by company operations would conform with Cumberland's prior location purchase practices. One Petitioner who has been terminated by Cumberland already has had his prior location turned into a company-operation.

[27] E.R. 673 (para. 14-15); 682 (para. 14-15); 691 (para. 14-15); 700 (para. 14-15); 709 (para. 14-15); 717 (para. 14-15);

The record therefore makes it abundantly clear that Chevron's delegation of its obligations to Cumberland was, and remains, clearly unsatisfactory to the Petitioners. That delegation materially increases the risk of unsatisfactory return performance being provided to the Petitioners, and has resulted in the Petitioners' loss of significant remedial statutory protections.

Additionally, the Petitioners have claimed that, even if the assignment of their franchises, and Chevron's market withdrawal, were valid, that their Chevron franchises were automatically renewed thereafter under state franchise law.[28] The District Court denied the Petitioners' claims by finding that their relationships with Chevron were

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752-763; 764-771.

[28] Companion cases Ackley v. Gulf Oil Corp., et al., Civ. No. 87-370, and Cohn v. Gulf Oil Corp., et al., Civ. No. 87-716.

not "franchises" under state law.

B. PRIOR PROCEEDINGS

The Petitioners' Amended Complaint was filed on February 22, 1988. Cross motions for summary judgment were filed by the parties. The District Court (Burns, J.) granted the Defendants' Motion for Summary Judgment, holding:

1) Chevron's assignment to Cumberland was valid under state law and therefore not a terminating event under the PMPA;

2) The dealers were not franchisees under state law, and therefore had not been automatically renewed under that statute. (Appendix B.)

The Court of Appeals affirmed the decision of the District Court. (Appendix A.)

REASONS FOR GRANTING THE WRIT

I. Chevron's delegation of its franchise performance obligations to the Petitioners

was invalid under the U.C.C.

The Petitioners claim that Chevron's assignment/delegation of the Petitioners' franchises was invalid, and thereby resulted in an impermissible termination of their petroleum franchises on June 1, 1986.

The parties agree that PMPA § 2806(b) specifically provides that the validity or invalidity of the assignment/delegation of a petroleum franchise is to be determined by reference to applicable state law. B-23(a). PMPA § 2806(b) provides as follows:

> (b) Nothing in this subchapter authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise, or by any applicable provision of state law which permits such transfer or assignment without regard to any provision of the franchise.

The franchise agreements between Chevron and each of the Petitioners make no provision whatsoever for the delegation of Chevron's

obligations to the Petitioners.[29]

If the attempted assignment/delegation of a petroleum franchise is invalid under applicable state law principals, a franchise termination under PMPA has occurred. Barnes v. Gulf Oil Corp., 795 F.2d 358 (4th Cir. 1986); May-Som Gulf, Inc. v. Chevron U.S.A., Inc. et al., 869 F.2d 917 (6th Cir. 1989).

Since the clear intention of the parties is that the "dominant factor" in their franchise relationships was the sale of trademarked petroleum products (i.e. a transaction in goods)[30] such agreements are to be treated as "sales of goods" contracts

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[29] See sample agreements. E.R. 276 et seq. and 308 et seq. Those agreements do, however, prohibit the Petitioners from assigning their rights and obligations to third parties. E.R. p. 304 para. 9 and p. 312(a) para. 13.

[30] Standard Structural Steel Company, 515 F. Supp. (D. Conn. 1981); Bonebrake v. Cox, 499 F.2d 951, 957 et seq. (8th Cir. 1974).

under the U.C.C.[31] U.C.C. § 2-210 (C.G.S. 42a-2-210) specifically addresses the instances in which such franchise obligations may be assigned/delegated. That section of the U.C.C. provides:

> (1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promissor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.
>
> (2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance . . . .

Since virtually all franchise relationships in the United States are

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[31] Sally Beauty Co. v. Nexxus Products Company, Inc., 801 F.2d 1001, 1005 (7th Cir. 1986); Brattleboro Auto Sales, Inc. v. Subaru of New England, Inc., Bus. Fr. Gde (CCH) para. 7562 (2d Cir. 1980).

"transactions in goods", and therefore treated as "sales of goods" pursuant to the U.C.C., this provision of the U.C.C. is applicable to virtually all assignments/delegations of franchise rights and obligations throughout the United States. This provision of the U.C.C. sets forth a general policy allowing for delegation except where the performance of the delegated obligations by a third party would be unsatisfactory to the franchisee. U.C.C. 2-210(1). Additionally, franchisor attempts to assign/delegate its rights and obligations are impermissible if such an assignment/delegation would materially increase the burdens or risks imposed upon the franchisee, or materially impair the franchisee's chance of obtaining satisfactory return performance. U.C.C. § 2-210(2).

Herein, it is clear that the Petitioners had a "substantial interest" in Chevron, as compared to Cumberland, performing or controlling the franchisor obligations in the franchise relationship. The record below is clear, and undisputed, that the Petitioners' burdens and risks increased as a direct result of Chevron's assignment/delegation to Cumberland, resulting in a material impairment of the Petitioners receiving their reasonably expected satisfactory return performance. The purpose and intent of the U.C.C. in this regard is to balance the general policy of free alienability of commercial contracts, while also protecting obligees such as the Petitioners from being forced to accept a bargain which they did not contract for. Sally Beauty Company, Inc. v. Nexxus Products Company, Inc., 801 F.2d 1001, 1006 (7th Cir. 1986).

The risk of an unfavorable outcome befalling the Petitioners as a result of Chevron's attempted assignment/delegation is clearly not one which the law can force upon these franchisees. Several cases have examined similar situations where an assignor (Chevron) has attempted to delegate its duties to an obligee (the Petitioners) to an assignee (Cumberland) who is a competitor of the obligee. While few in number, those cases uniformly hold that the duty of performance may not be delegated to a competitor of the obligee in the marketplace, nor to a wholly-owned subsidiary of a competitor, without obtaining the obligee's prior consent. Sally Beauty Company v. Nexxus Products Company, Inc., supra, at 1007-1008; Berliner Foods Corp. v. Pillsbury Company, 633 F. Supp. 557, 559-560 (D. Md. 1986), citing J.H. Westerberke Corp. v. Onan

Corp. 580 F. Supp. 1173 (D. Mass. 1984) and Morilla, Inc. v. M. Grunmbacher, Inc., 1983-2 Tr. Cases. (CCH) para. 65,499 (D. Mass. 1983). If, under all the facts and circumstances, including "subjective" evidence of such facts and circumstances, the acts of a franchisor or franchisee, relative to the other, and relative to the franchise relationship, are competitively altered as a result of the acts of one of the parties to that relationship, "substantial shortcomings detrimental" to the interests of the other party to the franchise relationship should properly be considered to have arisen, justifying a holding that the relationship has been terminated. Brattleboro Auto Sales, Inc. v. Subaru of New England, Inc., supra, at p. 12,368, fn 4.

> "No one can guarantee the outcome when competitive choices are between the demands of the assignee and the competing needs of the obligee. In such a case, even the risk of an

> unfavorable outcome, arising from the delegation, is not one which the law can force these dealers to take." Sally Beauty Company v. Nexxus Products Company, Inc., supra, at p. 1008.

II. Chevron's delegation of its franchise obligations directly resulted in the Petitioners' loss of explicit and remedial statutory rights and protections provided to them under state law.

As previously stated, Chevron was statutorily prohibited from operating gasoline stations with employees (i.e., "company operations") in Connecticut. C.G.S. 14-344a et seq. The Legislative history regarding Connecticut's enactment of this statute, and prohibition, makes it abundantly clear that the State Legislature perceived the unfairness and danger of supplier/landlords being in actual or threatened retail competition with dealers in

the petroleum industry.[32] As a result, the Legislature sought to remedy the situation, protect the dealers, and preserve fair competition by enacting the statute. When Chevron was the franchisor and supplier of the Petitioners, Chevron was nowhere in competition or threatened competition with them. Nor was there any incentive to eliminate franchises in order to convert to company operations. However, each of the Petitioners now finds himself in competition, or prospective competition, with his own supplier. Additionally, the new supplier

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[32] "These are the only people (i.e. the dealers) supplying energy in any way, shape, manner or form to the United States of America who show a willingness to compete on the basis of price and to pursue the principals of an open market. . . We're coming now as policymakers in the public sector in order to insure the kind of competitiveness, the kind of openness, a situation in which a tenant is not asked to compete with his or her own landlord in order to survive." Statement of State Senator Curry, E.R. p. 1617.

(Cumberland) is providing significantly more favorable product purchase and sale terms to its competing company operations, while dictating the competitive abilities of each of the Petitioners under the terms of its franchise agreements, and imposing significantly more onerous rental obligations upon the Petitioners in order to service the debt acquired as a result of this very transaction. In such a situation it is uncontradicted in the record that significant and on-going competitive harm to the dealers is assured.[33] Sally Beauty Company v. Nexxus Products Company, Inc., supra, at 1008.

While it is true that Chevron was in a position to attempt to exercise its discretion regarding many of these competitive factors, and contract terms and

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[33] E.R. 669-736 (Dealer Affidavits) and 752-771.

conditions, it was not a competitor of its own franchisees in Connecticut as is Cumberland.

The purpose and intent of the Legislature was to remedy precisely this type of situation. The right of the Petitioners to be free from franchisor competition, threatened competition, and threat of conversion to company operation, was an integral part of the contractual relationship which the Petitioners had with Chevron. Those contractual relationships included in their terms all rights and protections conferred upon these Petitioners under the laws of the State of Connecticut. N.C. Freed Co., Inc. v. Board of Governors of Federal Reserve System, 473 F.2.d 1210, 1215 (2d Cir. 1973), citing Von Hoffman v. City of Quincy, 4 Wall (71 U.S.) 535, 550, 18 L. Ed. 403 (1866). Those protections were available to

the Petitioners when they were Chevron franchisees. They were destroyed as a direct result of Chevron's delegation on June 1, 1986 to Cumberland.

III. A franchisor's assignment/delegation of its franchise obligations constitutes a non-renewal or termination of the petroleum franchise relationship under PMPA § 2802.

The provisions of PMPA are determinative of whether or not an "event" of non-renewal or termination has taken place. PMPA § 2801(14)(A) defines "non-renewal" as "a failure to reinstate, continue or extend the franchise relationship . . . at the conclusion of the term, or on the expiration date stated in the relevant franchise." Herein, Chevron delegated all of its franchise rights and obligations to Cumberland. Prior to doing so, Chevron notified each of the Petitioners that their

lease and supply agreements would not be renewed, and that Cumberland would assume Chevron's obligations under those agreements. The renewal provisions of PMPA address the renewal of the relationship between the parties rather than the specific rights or obligations of the parties under the franchise agreement.[34] Therefore, even if the franchises remained intact following the alleged "assignment" from Chevron to Cumberland Farms, the franchise relationship between Chevron and each of the Petitioners has clearly ended. Barnes v. Gulf Oil Corp., 795 F.2d 358, 362 (4th Cir. 1986); Chestnut Hill Gulf, Inc., et al. v. Cumberland Farms, Inc. and Chevron U.S.A., Inc., D.C. Mass., No. 86-3519-Mc Memorandum and Order of October 13, 1988, pp. 4-5; Florham Park

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[34] Senate Report No. 731, 95th Cong. 2d Sess. 30 (1978).

Chevron, Inc., et al. v. Chevron U.S.A., Inc. and Cumberland Farms, Inc., CCH Bus. Fr. Gde. para. 9011, pp. 18,418- 419 (D. N.J. 1987).

The District Court herein, however, held that the legitimacy of Chevron's claimed PMPA "market withdrawal" was irrelevant because of the validity of Chevron's assignment, which the District Court erroneously found. B-41(a). The District Court's Opinion (as affirmed by the Court of Appeals) ignores the undisputed fact that the franchise relationship between Chevron and each Petitioner ended on June 1, 1986. The facts are not only conclusive in this regard, but Chevron admits that its relationship with each of the Petitioners ended on or about June 1, 1986 in its non-renewal/termination notices, and in its letters to the Petitioners following its delegation to Cumberland. Ignoring this fact, the Courts

below refused to determine whether or not the franchises of the Petitioners had been renewed or terminated pursuant to an allowable "event" as prescribed under the PMPA.

IV. The numerous conflicting Federal District and Appellate Court decisions on the issue of whether a petroleum franchisor's assignment/delegation of its obligations to its franchisees constitutes a non-renewal or termination of the franchise relationship has created confusion, and threatens to undermine the uniformity which Congress sought.

In enacting PMPA, Congress sought to adopt uniform standards applicable to petroleum franchise terminations and renewals. Senate Report at 877; Darling v. Mobil Oil Corp., 864 F.2d 981, 984 (2d Cir. 1989). As a result of Chevron's purported assignment and "market withdrawal" from the northeast,

numerous Chevron franchisees instituted litigation within the First, Second, Third and Sixth Circuits. These cases have led to directly contradictory holdings on the issue of whether or not Chevron's actions constituted PMPA franchise terminations or non-renewals.

Chestnut Hill Gulf, Inc., et al. v. Cumberland Farms, Inc. and Chevron U.S.A., Inc., supra, (D. Mass.), considering exactly the same facts and circumstances applicable to this case, holds that the PMPA, and its legislative history, requires a holding that Chevron's actions constitute an event of non-renewal. In the case of Bruce Smith, et al. v. Cumberland Farms, Inc. and Chevron U.S.A., Inc., C.A. No. 87-1051 (W.D. Pa., August 15, 1988),[35] once again considering exactly the

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[35] Report and Recommendation of Magistrate (thereafter adopted as the opinion of the Court September 16, 1988).

same facts and circumstances applicable to this case, the Court held:

> ". . .that where a franchisor determines to withdraw from the market and, in accordance with its three options, chooses to sell the leaseholds to a third party, even if the sale is a valid assignment under state law, it is not a mere assignment within the meaning of the PMPA, but is a termination or non-renewal of the franchise relationship, and a cause of action will lie if the withdrawal is not accomplished in accordance with the provisions of the PMPA." Magistrate's Report and Recommendation at 11. (Emphasis added.)

Once again examining precisely the same facts and circumstances, the District Court of New Jersey held that PMPA non-renewals had occurred. Florham Park Chevron, Inc. et al. v. Chevron U.S.A., Inc. and Cumberland Farms, Inc., supra.

In the Second Circuit alone there are divergent opinions. In the case of Cedar Brook Service Station, Inc. et al. v. Chevron U.S.A., Inc. and Cumberland Farms, Inc., C.V.

86-4240 (E.D. N.Y., June 5, 1989), the Court held that, as a matter of law, Chevron's decision to withdraw from retail marketing in the northeast led to a non-renewal of the petroleum franchises in question. Further, that such a PMPA non-renewal event had occurred whether or not the franchises were validly assigned to Cumberland pursuant to state law. Opinion at 15-16.

These holdings are obviously in direct contradiction to the holdings of the District Court (see B-71a through 73a) and Second Circuit in this case, which conclude that the validity of Chevron's purported assignment/delegation to Cumberland forecloses any need to determine whether or not Chevron's non-renewal/termination of the franchises was valid under the standards of PMPA. B-41(a). The Second Circuit's affirmation of the Connecticut District

Court's Opinion in this regard therefore would apparently also be in direct conflict with the Opinion of its own Eastern District in Cedar Brook, supra.

The Sixth Circuit's Opinion in May-Som Gulf, Inc. v. Chevron U.S.A., Inc. and Cumberland Farms, Inc. (869 F.2d 917 (1988)) also holds that proper grounds under PMPA must exist for a valid petroleum franchise termination or non-renewal to occur. Both Cumberland and Chevron argued before the District Court for the Western District of Pennsylvania (Smith, et al. v. Cumberland Farms, Inc. and Chevron U.S.A., Inc., supra) that the Sixth Circuit's Opinion in May-Som stood for the proposition that the termination and non-renewal standards of PMPA would not be applicable if a valid franchise assignment from Chevron to Cumberland had occurred. The District Court rejected

Chevron's and Cumberland's arguments in this regard.[36]

In a virtually identical situation, the Fourth Circuit has held, in Barnes v. Gulf Oil Corp. et al., 795 F.2d 358 (1986), that neither a petroleum franchisee nor a franchisor may frustrate the PMPA statutory rights of the other by an assignment. Barnes, supra, at 362-363.

To the contrary, however, in McGee v. Gulf Oil Corp., (N.D. Ala. 1985) CCH Bus. Fr. Gde. para. 8379, and Aldrich v. Amoco Oil Company (S.D. Iowa 1985) CCH Bus. Fr. Gde. para. 8322, District Courts have held that a franchisor's assignment of franchise performance obligations is not a PMPA event of non-renewal or termination.

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[36] Report and Recommendation of the Magistrate at 10-11. The District Court herein adopted those same arguments. B-71(a) - 73(a).

Confusion on this critical issue is therefore spread throughout the Circuits. However, each of the Courts reaching determinations relative to Chevron's dealings with Cumberland in the northeast have concluded that Chevron's actions constitute a PMPA non-renewal. The sole exception is the Connecticut District Court, and the affirming Opinion of the Second Circuit Court of Appeals, which contradicts the holding of the Eastern District of New York within the same Circuit.

Other Appellate and District Courts reviewing the issue have reached significantly differing results.

A conclusive determination of whether or not the remedial standards of PMPA are applicable to the assignment of petroleum franchises nationwide, which large scale assignments are expected to continue unabated

into the future, is needed in order to effectuate Congress' intended uniformity, and to provide guidance to franchisors and franchisees in the future.

V. Chevron's actions cannot be held to constitute a valid PMPA "market withdrawal".

Because of improperly concluding that a valid assignment of Chevron's performance obligations to the Petitioners had occurred, and that such a conclusion precluded the need to examine whether or not the termination/non-renewal provisions of the PMPA had been satisfied by Chevron, neither the District Court nor the Court of Appeals reviewed the validity of Chevron's non-renewal/termination of the Petitioners' franchises under PMPA.

Chevron's invalid assignment/delegation clearly resulted in a termination of the Petitioners' franchises on June 1, 1986.

Barnes v. Gulf Oil Corp., supra at page 363; May-Som Gulf, Inc. v. Chevron U.S.A. Inc., et al., supra. In the face of such an invalid delegation, and resultant termination of the Petitioners' franchises, Chevron must prove that its termination on June 1, 1986 was permissible under the PMPA as a "market withdrawal".[37] Chevron is unable to prove that it conducted a "market withdrawal" because:

1) Such a market withdrawal has not actually occurred;

2) Chevron failed to comply with PMPA's notice provisions.

Before it completed its transaction with Cumberland on June 1, 1986, Chevron was marketing its gasoline through franchisees, including the Petitioners, in Connecticut.

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[37] Chevron bears the burden of proving that it has complied with PMPA's termination standards. PMPA § 2805(c).

Sales of its gasoline were being made under the Chevron or Gulf trademarks. Following the completion of its transaction with Cumberland, and pursuant to the existing Product Sales Agreement[38], Chevron supplies gasoline to Cumberland Farms, and allows Cumberland to market that gasoline under Chevron's "Gulf" trademark. Cumberland then supplies the same Gulf brand gasoline which it has purchased from Chevron to Cumberland's company owned and operated retail outlets for sale to the public at retail under the Gulf tradename, for Cumberland's own account. The relationship between Chevron and Cumberland is unequivocally one of a petroleum franchise as defined under PMPA § 2801. C-83a - 85a. Cumberland's retail sale of the Gulf gasoline it obtains from Chevron is made from "marketing premises" (i.e., Cumberland's

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[38] E.R. pp. 992, et seq.

retail outlets) as that term is defined in PMPA § 2801(a). Cumberland is also a "retailer" as that term is defined under PMPA § 2801(7).

PMPA's market withdrawal provisions allow for franchise termination only where a franchisor validly elects ". . . to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located. . .". PMPA § 2802(b)(2)(E); C-86a - 88a. Therefore, Chevron is, as a matter of law, unable to meet its burden of proving that it has factually conducted a market withdrawal as that process is defined under the PMPA. Simply put, Chevron's relationship to the distribution of Gulf gasoline within the State of Connecticut after June 1, 1986, has not changed at all. The only thing that has changed in

Connecticut is the identity of Chevron's franchisees. Cumberland is now Chevron's franchisee selling Chevron gasoline through retail outlets within the State of Connecticut rather than the Petitioners. No market withdrawal has therefore taken place.

Congress also set out specific written notice provisions when PMPA franchisors intended to terminate or non-renew their franchisees. Contrary to the general ninety (90) day notice provision for termination and non-renewal within PMPA,[39] Congress intentionally extended the notice period to one hundred and eighty days (180) where a franchisor intends to terminate or non-renew franchisees because of an intended market withdrawal. PMPA § 2804(b)(2). C-89a. Chevron must show that it has strictly complied with the notice provisions of PMPA.

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[39] PMPA § 2804(a). C-88a.

Walters v. Chevron U.S.A., Inc., 476 F. Supp. 353, 355 (N.D. Ga. 1979) aff'd 615 F.2d 1135 (5th Cir. 1980). Herein, Chevron provided the Petitioners with notice of its intended assignment and market withdrawal on February 14 and March 10, 1986. Chevron then completed its transaction with Cumberland on June 1, 1986. It is indisputable that the completion of Chevron's transaction with Cumberland on June 1, 1986, and its assignment/delegation of the Petitioners' franchises, was the event that constituted and completed Chevron's alleged "market withdrawal" under the PMPA. However, the "event" of market withdrawal occurred only one hundred and five (105) days after Chevron's PMPA notice of February 14, 1986, to the Petitioners. Chevron's failure to provide PMPA's required one hundred and eighty (180) day prior written notice before

the actual occurrence of the event of termination on June 1, 1986, renders its "notice" letters fatally defective. Walters v. Chevron U.S.A., Inc., supra.[40] Therefore, although the Courts below failed to review the issue relating to the validity of Chevron's claimed "market withdrawal", the record below is conclusive, and to the effect that Chevron cannot meet its burden of proving that it has complied with the market withdrawal provisions of PMPA.

Therefore, Chevron's invalid delegation resulted in a termination of the Petitioners'

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[40] The content of Chevron's termination notices to the Petitioners is also insufficient. Rather than stating that the Petitioners' franchises are to be terminated or non-renewed, the notices specifically state that the franchise relationships are not being terminated or non-renewed. Additionally, no specific date for the occurrence of the "event" of termination or non-renewal is set forth. Mobil Oil Corp. v. Vachon, 580 F. Supp. 153, 158 (D. Mass. 1983).

franchises on June 1, 1986. Since the termination of the Petitioners' franchises did not comply with any of the termination or non-renewal grounds sanctioned under the PMPA, the right of the Petitioners to be free from such impermissible terminations has been violated.

VI. The construction of the state statutory definition of "franchise" by the Courts below would improperly have the effect of rendering the remedial state statute a practical nullity.

The Petitioners have advanced the additional claim that, even if Chevron's assignment/delegation is valid, and the alleged market withdrawal is valid, Cumberland's attempt to renew the franchise relationships of each of the Petitioners was untimely under Connecticut law. Lasko v. Consumers Petroleum of Connecticut, Inc., 547

F. Supp 211 (D. Conn. 1981). The District Court held that, since the Petitioners were not "franchises" under Connecticut law, the automatic renewal provisions of the statute did not apply.[41] The Courts below held that, under Connecticut General Statute 42-133k, the Petitioners were required to show that they were selling gasoline ". . . under a marketing plan or system prescribed in substantial part by a franchisor . . ." B-41(a) et seq.

However, the explicit statutory language of Connecticut General Statute 42-133k(b) states:

> ". . . and includes any agreement between a manufacturer, refiner or producer, and a distributor,

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[41] The automatic renewal claims of the Petitioners were advanced in District Court No. 87-370 ("Ackley II") and District Court No. 87-716, Cohn v. Cumberland Farms, et al. Ackley II and Cohn were consolidated with Ackley I for the purposes of the District Court and Court of Appeals actions.

> wholesaler, or jobber, between a manufacturer, refiner or producer and a retailer, or between a distributor, wholesaler, jobber and a retailer." (emphasis added).

The statutory definition of "franchise" set forth by the Connecticut Legislature includes within its intended coverage the specific relationships of retailer and refiner (Chevron-Petitioners) and distributor-retailer (Cumberland-Petitioners). The Courts below have ignored the Legislatively intended specific inclusionary language in the statute. The statute's reference to "marketing plan" in the first portion of the statute is intended to make it clear that other types of relationships may be considered franchises, in addition to the specifically listed relationships in the final clause of § 42-133k(b) if a marketing plan associated with a trademark exists. The Connecticut Supreme Court is in full accord.

Muha v. United Oil Company, 180 Conn. 720, 729 (1980). Therein the Court stated that the amendment to include the specific inclusionary language of the statute was intended to create substantive rights and was not meant "merely as clarifying or interpreting the scope of the definitions in 42-133e(b) and (c) as originally enacted."

The holding of the Courts below has had the effect of improperly nullifying the intended and remedial application of a state statute to the petroleum franchise relationship. Under the facts herein, if the Petitioners are not franchisees within the meaning of the statute, virtually no petroleum franchisees would be covered by the Connecticut Act.[42]

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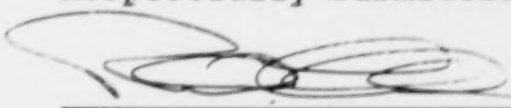
[42] See, in this regard, the uncontradicted affidavit of C. Matties, E.R. pp. 737-751.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that a Writ of Certiorari be granted.

Dated this 14th day of February, 1990.

Respectfully submitted,



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